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**Intent: *Ius In Bello* Norms in Just War Theory
The Case of the War in Gaza in 2009**

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Intent: *Ius In Bello* Norms in Just War Theory

The Case of the War in Gaza in 2009

by

Howard Adelman

On the panel “Utility in Ethics: Past Precedents and Future Reforms re: *ius in bello*”

International Studies Association

Theme of “Exploring the Past, Anticipating the Future”

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I Introduction

“I am sure they (the IDF soldiers) committed this crime.”¹ I read these words just after I had finished the first draft of this paper on 1 February 2009. Oakland Ross, the *Toronto Star* journalist, was quoting Dr. Ezzeldeen Abu al-Aish who had trained at the Soroka hospital in Beersheba and the Tel Hashomer hospital in Tel Aviv. The interview was held at the latter Israeli hospital where another daughter was being treated for her injuries after the IDF opened the Ezer crossing to Gaza in a rare exception and allowed a Palestinian ambulance to meet up with an Israeli ambulance so the injured child could be transferred by IDF helicopter to the hospital. Dr. Abu al-Aish, a gynaecologist at Gaza's main Shifa Hospital, was a peace activist; his children attended peace camps with Israeli children. During the war, he had been heard frequently on Israel's Channel 10 TV station reporting in fluent Hebrew by cell phone via his friend, the Israeli journalist, Shlomi Eldar, to Israelis on the health problems resulting from the war that he had been witnessing in Gaza from his top floor apartment of a five-storey apartment building on Salahadin Street at the corner of Zino Rd. in Jebaliya just north of Gaza City. On Friday, 16 January 2009 less than 36 hours before the ceasefire went into effect in Gaza on Sunday, 18 January 2009, he was on the air when two shells from an Israeli tank parked a block away ploughed through his apartment and killed three of his daughters. 22-year-old Bisan, 15-year-old Mayer, 14-year old Ayan, and his 14-year-old niece, Nour Abu al-Aish.

Was this intentional? The deliberate killing of non-combatants is a war crime. Or was it an accident when the Israeli defence forces responded to alleged gunfire from Hamas fighters on the roof of the building, as the IDF claimed and Dr. Abu al-Aish denied. Even if the IDF account is true, it is inadequate to escape the charge. For it is not sufficient that the victims not be the intended targets. Military personnel have an obligation to take reasonable care to minimize the chances of non-combatants being killed. Further, this is an ethical norm taught to the Israeli military and was an explicit Israeli objective of the war. Unless an independent investigation is conducted, we will never know.

The incident is particularly acute for Toronto as the locale of the Canadian International Scientific Exchange Program (CISEPO) which focuses on health issues to build bridges between Israelis, Palestinians, Jordanians and Canadians. On the 2nd of February because of my small involvement with CISEPO, I attended a talk by Dr. Noyek, founder of CISEPO, on "Health as a Bridge to Peace". Dr. Abu al-Aish was a part of that Bridge to Peace and about to leave with his family for our city on the invitation of Dr. Peter A. Singer, a child of holocaust survivors, a Professor of Medicine who holds the Sun Life Financial Chair in Bioethics, serves as Director of the University of Toronto Joint Centre for Bioethics and Co-Directs the Program on Life Sciences, Ethics and Policy at the McLaughlin-Rotman Centre for Global Health. Those two Israeli tank shells and the death of those four children reverberated all the way to Toronto. One cannot think of the ethical question of intent and the problem of discriminating between combatants and non-combatants as simply an abstract detached issue.

¹ Oakland Ross, "Gaza Heartbreak," *Toronto Star*. 1 February 2009.

Although, “Civilians are owed due care; all reasonable, diligent, professional efforts that they not wind up casualties of war,” and although at the very top of the military, “those who craft military strategy must create battle plans which minimize the risk of civilian casualties,”² and from the bottom, the soldiers must be trained to implement that strategy, in fact the problem is far more complex, as we shall see, in fighting wars against not uniformed armed personnel living amongst civilians where opportunistic unpredictable targets suddenly emerge and instant decisions have to be made.

II Intent³ as an Ethical Norm *in ius bello*

In the panel this morning on 15 February, Darrell Cole of Drew University presented a paper on “War and Intention” as part of a panel on “Judging Wars” with respect to *ius ad bellum*, assessing intention in going to war. Most theory focused on just war emphasizes “*ius ad bellum*”. In that context, the Israeli “intent” of going to war was justified by a combination of self-defence and the fact that its intent was *not* to harm civilians but to severely damage the military capabilities of Hamas. As Paula Cooley⁴ put it, “intentions distinguish the violence done to civilian life such that collateral damage, while inevitable and regrettable, does not fall under the category of terrorism, unlike killing civilians with bombs strapped to their bodies. Taken together and coupled with the argument of self-defense, the criterion of pre-emptive strike and the definition of terrorism justify Israel’s response to Hamas in Gaza.”⁵ For most, the issue of ethics involved the conduct of the war and not going to war itself. Some even contended that the unethical conduct of the war totally detracted from the justified reasons for going to war while others, such as Moshe Arens, argued that Israel had missed its opportunity to destroy Hamas by not making that a war aim.⁶

Most practitioners concerned with detailed problems and disputes over just war issues focus on “*ius in bello*” problems rather than *ius ad bellum* concerns, since the vast majority of applied concerns, institutional practices and legal precedents in weighing justice issues with respect to war are concerned with just conduct in waging war, the focus of this panel. This paper analyzes intention in the conduct of a war, in particular the intent to discriminate between combatants and non-combatants – particularly in the context of a war in which one side does not use uniforms that provide the visible

² Brian Orend, *On War: A Dialogue*, Lanham, Maryland: Rowan & Littlefield, 2009, 103.

³ When referred to the agents being protected, the principle is also called the non-combatant or civilian immunity or protection principle as distinct from “intention” which refers to the mental state of the agent engaged in fighting. When the two are linked, it is called the principle of discrimination. Cf. Richard Harries (2006) “Application of Just War Criteria in the Period 1959-89,” in Bernard Sorabji and David Rodin, (eds) *The Ethics of War: Shared Problems in Different Traditions*, Aldershot, UK, Ashgate, 228.

⁴ Paula Cooley is the Margaret W. Harmon Professor of Christian Theology and Culture at Macalester College in St. Paul Minnesota.

⁵ Paula Cooley, *Religion & Ethics*, 8 January 2009. <http://www.pbs.org/wnet/religionandethics/episodes/by-faith/jewish/commentary-is-gaza-a-just-war/1888/>

⁶ Yoel Marcus, “Tweezers work better than a hammer,” *Haaretz*, 3 February 2009. See Moshe Arens’ op-ed. “A Missed Opportunity” in the same issue.

distinction between combatants and non-combatants.⁷ Further, there are those who argue that organized states versus irregular forces have to abide by more stringent standards than the weaker parties in asymmetrical warfare.⁸ Further, it is important to recall that the function of introducing the conception of “intention” is to help assess the observance of the principle of “proportionality” in the conduct of the war, a subject I addressed at last year’s ISA.⁹

So this paper deals with a concrete problem rather than a meta-ethical one. There is a parallel panel on “Individual Criminal Responsibility in the Conduct of War” and Janina Dill of Oxford University in her paper “Individual Moral and Legal Responsibility in the Practice of Combat” will try to answer the question whether the “Law of Armed Conflict Can Tell Right from Wrong” and whether ethical principles re the conduct of war can subject legal norms and practices to an ethical analysis. In contrast, this paper focuses on both the ethical and legal issues in the conduct of war with respect to the issue of “intention” in the conduct of war that bears directly on the issue of the criteria for assessing individual responsibility in the conduct of war.

In doing so, I will have to subject the principle of intention itself to an analysis since many argue that “intent” can be interpreted too narrowly and exclude the wider context, such as “neo-colonialism”, can use ethical and legal criteria to obfuscate what is actually happening and what is clearly repugnant to anyone simply looking on, and to the general context in which the public have become inured to ethical issues in the repeated incidents of gross unethical conduct in war with virtually no consequences to anyone. It is within this larger context that I will deal with the required proof of “malevolent intent”. Further, this paper is directly related to the theme of the conference because my concern will be with “practices” – another parallel ethical panel to this one on the general level -- in assessing *ius in bello* issues in past practices and how they provide precedents and reforms in dealing with *ius in bello* issues in the future, in this case, the issue of intent, not only on a normative level but according to the criterion of efficaciousness.. In other words, this paper is not only about practices as they have taken place but about how, from our analysis, we can affect practices in the future in an effective manner. In that concern with practices, as in my last year ISA paper on “proportionality”, I will offer the case study of the recent Gaza War.

III A Brief Note on Proportionality *in ius bello*

This paper does not focus on proportionality but I want to touch on that issue both as a follow up to last year’s paper and because the intention to discriminate between combatants and non-combatants directly effects the evaluation of proportionality. However, *in common parlance* as distinct from ethical and legal theory, proportionality in

⁷ For a primary on this issue, see the papers from the “Understanding Collateral Damage Workshop” held in Washington D.C. on June 4-5 by the Carr Center for Human Rights Policy of the John F. Kennedy School of government of Harvard University.

⁸ David Rodin, “The Ethics of Asymmetric Warfare,” in Bernard Sorabji and David Rodin, (eds)

⁹ Howard Adelman (2008) “Excessive Force and Proportionality in Just War Theory: Trying Cases and Not Just Undertaking Case Studies,” ISA.

just war theory is not perceived as the ratio of death and damage suffered relative to the military goals, that is, the effort to minimize the harm done to non-combatants against the war aim of prevailing and accomplishing the military objectives¹⁰, but the ratio of death and damage suffered by one side compared to the casualties and physical damage absorbed by the other side.¹¹ The latter is not the conception of proportionality in just war theory. If those were the terms of reference, Israel suffered negligible physical damage, lost 10 soldiers, four from friendly fire, and 3 civilians. In contrast, Gazans allegedly suffered 1285 dead¹², of whom, according to the IDF, less than one-third were civilian¹³,

2006) *The Ethics of War: Shared Problems in Different Traditions*, Aldershot, UK, Ashgate, 153-168.

¹⁰ Cf. Alex J. Bellamy, *Just Wars: From Cicero to Iraq*, Cambridge, UK: Polity Press, 2006, 181.

¹¹ This popular view is widely shared by the media. Cf. Thomas Darnstädt and Christoph Schult, "Did Israel Commit War Crimes in Gaza?" *Der Spiegel online*, 26 January 2009. They stated that "the *immense* (my italics) number of civilian casualties suggest that it did." But they neither checked their numbers nor the applicable laws and ethical norm -- whether, in their own words, the number of deaths was "blatantly disproportionate to the military value of the operation."

<http://www.spiegel.de/international/world/o.1518.603508.00.html>

¹² This figure itself is now being questioned since an Italian journalist for Italy's *Corriere della Sera*, Lorenzo Cremonesi, reported on 22 January 2009 that the actual numbers were half that based on his visits to various hospitals, such as the European Hospital in Rafah, the Nasser Hospital in Khan Younis, the Amal Hospital, etc., in the Gaza Strip and interviews with doctors in those hospitals. Most of the wounded were males between the ages of 17 and 35. Contrast this with the claim that of 1194 officially registered dead from 27 December to 17 January 2009, 1099 were civilians according to the Palestinian Centre for Human Rights.

¹³ This figure seems odd since after the first week of the war, the IDF claimed it had killed approximately 300 Hamas out of almost 800 casualties so that civilians would have represented 62.5% not 33% of the casualties. Cf. Amos Harel, "IDF: Hamas beginning to desert; army steps up Gaza op," *Haaretz*, 11 January 2009. <http://www.haaretz.com/hasen/spages/1054245.html>. See also the claim by an Italian journalist that a Gaza doctor insisted that there were at most 600 casualties, mostly Hamas youth.

<http://www.ynetnews.com/articles/0,7340,L-3660423,00.html>. This dispute over figures is compared to the dispute over the numbers killed in Jenin which were initially reported to exceed a thousand and eventually established as 54 of whom 45 were armed men. Certainly CAMERA, the Committee for Accuracy in Middle East Reporting in America, has questioned the Palestinian Committee on Human Rights (PCHR's) figures (16 January 2009). On the other hand, "CAMERA has identified a number of Hamas fighters and members of other Palestinian terrorist groups who were either misclassified by PCHR as civilians, not identified as combatants, or omitted entirely from their tabulations." Further, "An analysis of the fatalities by age and gender shows that the majority of civilian fatalities recorded by PCHR are males between 15 and 40 years old, the same age profile as the combatants."

http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1603) One complicating factor in the counting is that Hamas fighters wore civilian clothing, so the figures of women and children killed are very relevant. So is the independence of the compiler of the figures and PCHR has been explicitly partisan. Further, PCHR allegedly omitted from its casualty figures Hamas members who were widely reported as killed, possibly because Hamas ordered such information to be repressed:

- Jihad Abu Medif (Medyiff) - identified as member of Al-Aksa Martyrs Brigade
- Haitham Abu al-Qumsan - identified as member of Al Aksa Martyrs Brigades
- Hamdi Fareed Abu Hamada - identified as member of Al Aksa Martyrs Brigades
- Eyad al-Maqqousi - identified as member of Al Aksa Martyrs Brigades
- Mohammed 'Abed Hassan Brbakh - identified as DFLP commander
- Tariq Nimer Abu Amsha - identified as member of Islamic Jihad al-Quds Brigades
- Shams Omar - Al-Quds (Islamic Jihad) commander in Gaza

CAMERA's examination of PCHR's reports found no mention of several senior commanders from Hamas whose deaths were widely reported in the media :

- Mahmoud Shalpokh on Jan. 4
- Ayman Siam on Jan. 6

but, according to Hamas, 43% were women and children.¹⁴ More than 4,300 were wounded, mostly civilians, including 1,133 children and 735 women according to the Palestinian Centre for Human Rights (PCHR), with enormous devastation to the homes (over 2400, almost 500 from the air)¹⁵, institutions¹⁶ and infrastructure in Gaza. However, in just war theory, that is *not* what proportionality means. The losses were certainly totally skewed one way and entirely asymmetrical.

With respect to the proportionality of the conduct of war in Gaza, Tony Lang argued that, “The Israeli economic and military response [in Gaza] has been profoundly disproportionate on three levels. Their initial economic blockade of the Gaza Strip, which is run by Hamas, has created huge economic hardships,” punishing entire communities. Second, the air campaign, by the very nature of such campaigns, has been indiscriminate (since) strikes from the air will remain indiscriminate when targeting heavily populated areas.¹⁷ Third, the ground campaign... perhaps as a result of Israeli public discourse

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- Amir Mansi on Jan. 10
 - Muhammad Hilou on Jan. 4 (a man with a similar name was listed but with no indication that he was a member of Hamas or a combatant)
 - Abu Zakaria al-Jamal on Jan.3

¹⁴ Steven Erlanger, “Weighing Crimes and Ethics in the Fog of war,” *New York Times*, 18 January 2009. Cf. Palestinian Centre for Human Rights, posting, 22 January 2009. <http://www.pchrgaza.org/> Note the discrepancy that CAMERA pointed out that of the PCHR child fatalities 23% are 15-17 years of age even though this age group constitutes only 8% of the Palestinian Gaza population. The Palestinian National health Authority figures were even higher reporting 410 “children” dead compared to a figure of 281 for PCHR and only 81 women compared to the PCHR figure of 111. in any case, why were four times as many “children” killed as women when some of the women were fighters?

¹⁵ This number represents about 1% of the housing stock in Gaza.

¹⁶ These included 28 government buildings, including the Palestinian legislative building as well as ministry and municipal buildings, 29 schools damaged or destroyed, 21 privately owned facilities such as wedding halls and hotels, 30 mosques, 121 industrial and commercial buildings and 5 media buildings. Given the extent of the destruction to civilian buildings, the shock is that there were so few civilian casualties though the Palestinian Centre for Human Rights claimed that, the, “IOF bombarded civilian facilities, mosques and houses, without paying attention to the lives and safety of Palestinian civilians.” The Palestinians charged Israel with bombing the facilities of the Islamic University of Gaza (IUG) with 20,000 student on 28 December 2008 a day after final exams for the Fall semester were about to begin completely destroying two 5-storey buildings, the Science labs and the Engineering lab building, presumably because the IDF believed that these were being used to help build the rockets. Such incidents raise the issue of targeting dual use facilities but that issue will not be explored in this paper.

http://www.pchrgaza.org/files/W_report/English/2008/22-01-2009.htm

¹⁷ This was very different than the point Tony made after 9/11 when he argued that although the continual bombing of Iraq for the past ten years had perhaps been “morally justified” it was still immoral on consequentialist grounds. In other words, aerial bombardment was not by its nature immoral, the position he took above. See Tony Lang, “The Ethics of the ‘New War’ in the Aftermath of 9/11,” Carnegie Council Online Roundtable, 20 October 2001, http://www.cceia.org/resources/articles_papers_reports/213.html Contrast this moralistic tone with the following far more sober ethical advice on the use of aerial bombardment by Lt. Col. Tomislav Ruby of the USAF Air Command and Staff College in Montgomery Alabama. “To ensure moral targeting decisions, national political leaders must suffer the costs of monitoring in terms of time and money, and provide not only detailed direction, but also constant oversight to ensure objectives are clear and subordinates carry out directions. Military officers must ensure that their motivations align with those of their principals, and they must ensure that constraining doctrine for planning and executing combat operations is followed. Having satisfied these variables, moral targeting decisions, wherein proportionality of non-combatant casualties is weighed against target necessity, should then be easily attainable.” “Making Moral Decisions in War: The Importance of Principal-Agent

about Hamas and the Palestinians, some of that moral sensibility has been undermined...(and) the Israeli ground campaign has been less discriminate than it could be, but more discriminate than the air campaign.”¹⁸

Tony wrote this a week into the war obviously heedless of the lessons of my paper on proportionality at ISA last year of the difficulty in forming judgments in the absence of particular evidence and an investigation of particular cases, though when I detailed one case I suggested there was a plausible claim for a war crime investigation and possibly a charge in that case. Secondly, Tony also knows both that proportionality cannot be assessed simply by weighing the expected military gain from an individual action against the civilian casualty costs or certainly that proportionality cannot be assessed simply in terms of collateral damage – which Tony simply says could have been less – except in relationship to the military objectives in general. As Erlanger put it so clearly, “proportionality is defined as a question of judgment, not of numbers: Is the potential risk to civilians excessive in relationship to the anticipated military advantage? That puts the weight on military advantage, since civilian risk is a given and must not be “excessive.” Even if the target is legitimate, was the right weapon used to try to minimize civilian damage? The key is the expected damage the commander anticipated from the use of a certain weapon, and not what actually happened when it was fired.”¹⁹

Let us review the first of Tony’s three charges of disproportionality. Was Israel’s “blockade” of Gaza prior to the war disproportionate? According to Gisha, the Legal Centre for Freedom of Movement, it is precisely because the “closure” of Gaza was *not* a blockade that made it illegal, for Nisha argued that because the restrictions on goods entering and leaving Gaza as well as the movement of peoples did *not* have a military objective but both were intentionally aimed at the collective punishment of civilians, and because in Israel retaining control of the borders it continued to have obligations to the civilians as an occupying power, these were the point that made the restrictions illegal.²⁰ So if Tony is correct and the restrictions were a blockade by a foreign power for military objectives (incidentally military objectives that are part of the “new” warfare that do not

Motivation Alignment and Constraining Doctrine" Paper presented at ISA in Montreal, 27 February 2004
http://www.allacademic.com/meta/p72241_index.html

¹⁸ Tony Lang, *Religion & Ethics*, 8 January 2009.

¹⁹ Erlanger, op. cit. <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html>

²⁰ Gisha: Legal Centre for Freedom of Movement, “Gaza Closure Defined: Collective Punishment: Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip,” December 2008;

[http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Gaza%20Closure%20Defined%20Eng\(1\).pdf](http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Gaza%20Closure%20Defined%20Eng(1).pdf) Many other organizations picked up on the theme of “continuing

occupation” combined with “intent to inflict collective punishment” as the basis for declaring the actions illegal even if the legal arguments were weak in the extreme. See UN Under-Secretary-General for Humanitarian Affairs, John Holmes: UN News Service, “Middle East Peace Process Needs Changes on the Ground to Succeed – UN Envoy,” 26 February 2008,

<http://www.un.org/apps/news/story.asp?NewsID=25767&Cr=palestin&Cr1>; Amnesty International, “Gaza Blockade: ‘Collective Punishment’ Condemned,” 21 January 2008,

http://www.amnesty.org.uk/news_details.asp?NewsID=17616; Oxfam International, “Israel’s Blockade Poses Immediate Threat to the Lives of Gaza’s Sick and Elderly,” 25 January 2008

<http://www.oxfam.org/en/node/266>

aim at destroying the enemy but at altering enemy behaviour) – to restrict or limit the resupply of military equipment to Hamas controlled Gaza in order to limit rocket attacks on Israel, the blockade was *not* illegal.²¹

Since I will return to the claim that aerial bombing by its very nature when bombs are used against densely populated areas are illegal and the claim that the IDF did not use adequate discrimination in the ground attack, for now I merely want to raise the following question. Was Tony's response to Israel's civilian casualty rate proportionate to his responses to the sources of other civilian casualty rates in Gaza? For example, did Tony criticize Hamas for its attacks on civilians for disobeying its edicts on moral behaviour, as when in October 2007 a bomb blew up a beauty salon and damaged nearby homes in Gaza City when the owners failed to heed Hamas warnings on modesty. In Hamas' moral war, that action could even be viewed as ethical since the civilians were removed from the salon. However, when 31-year old Rami Ayyad, director of The Teacher's Bookshop operated by the Palestinian Bible Society, was killed in 2007 for crimes against Islam for propagating the Christian faith, did Tony become upset? When, in the civil war between Hamas and Fatah in Gaza, the toll hit almost 600. Did Tony even examine the degree of discrimination in avoiding as far as possible the death of civilians? Or were they regarded as martyrs when 2 Palestinian women and a child were blown up when explosives being handled by militants went off prematurely in Khan Yunis in 2007? Did Tony have anything to say when Hams spokesperson, Fathi Hammad, not only defended but celebrated the illegal use of civilians for human shields when he boasted, "For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the mujahideen and the children. This is why they have formed human shields of the women, the children, the elderly, and the mujahideen, in order to challenge the Zionist bombing machine."²²

I am not saying that Tony should evaluate every instance. Rather, I am questioning the insignificant attention to the confessed crimes on one side and the exceeding attention to the denied and disputed claims of illegality on the other side without adequate evidence and analysis. Not that Tony should avoid possible Israeli crimes for I could not find where Tony even evaluated such incidents as when an Israel shell killed 30-year old Asma Okal and her two small children, Maria and 8-month old Shahd, in their own garden in July of 2006?²³ Again, it is not that Tony can be expected to evaluate all incidents of civilian casualties, but was there even some attempt at a proportionate assessment of other civilian losses through violent conflict in Gaza? Was there any attempt to assess the killing of Fatah members under the cover of war?

²¹ For an argument on why the restrictions were not illegal, see Justice Reid Weiner and Avi Bell, "international Law and Fighting in Gaza," MESI, Legacy Heritage Fund, 29 December 2008. <http://www.jcpa.org/text/puzzle1.pdf> and for a refutation of Amnesty International's claim, see "[Amnesty International's anti-Israel stance undermines human rights and international law](#)," Prof. Avi Bell, Jurist Hotline Blog, January 5, 2009

²² <http://www.youtube.com/watch?v=g0wJXf2nt4Y>

²³ Sami Abu Salem "Mother and Two Children Killed in Israeli Attack on Gaza," Electronic Intifada 7/31/2006 <http://electronicintifada.net/v2/article5359.shtml>

What about a comparison with civilian casualties in other recent wars of this type? In “Operation Enduring Freedom” (OEF) in the campaign against the Taliban in Afghanistan in 2002 led by the United States and its allies, such as Canada, the bombing campaign claimed an estimated 1000-1300 civilian lives based on stringent accounting procedures to offset inevitable hyperbole in reporting civilian casualties, higher than the estimates of civilian deaths in Gaza even by Hamas in a far less densely populated area where civilian casualties would be expected to be far greater?²⁴ My point last year was that the empirical numbers and strategic and tactical differences had to be taken into account in applying the ethical norms. Just because aerial bombing campaigns may occur at over 20,000 feet, ethical evaluations have to be well grounded. One has to do one’s empirical homework and not blast off morally from the heavens. The key variables in the difference were probably the difference in campaign objectives, for Operation Cast Lead did not have as its objective the overthrow of the Hamas regime (in spite of Tony’s assertions) and former prime minister Binyamin Netanyahu has criticized both Defence Minister Ehud Barak and Foreign Minister Tzipi Livni in the Israeli election that followed for failing to make that the objective.²⁵ Improved accuracy in targeting since the Afghan aerial campaign and far better intelligence on the ground by the Israelis resulted in far fewer civilian casualties than I for one had expected, though the emphasis on mobile and opportunistic targets, that is targets that are not fixed but which cannot be anticipated, emerge unpredictably and require an immediate response, undoubtedly made the civilian casualty toll much higher than it could have been.

In those terms, clearly the economic on-and-off blockades of altering severity were insufficient for they did not succeed in stopping the rain of rockets from Gaza on towns like Sderot or prevent the development and employment of more and better rockets with increased range and accuracy let alone the pin pricks that Tony suggests restricting its military to “a response that takes out the rocket sites and those manning them, but not a full-scale response designed to destroy the economy and polity.” Tony fails to acknowledge that there are no rocket sites to take out since they are totally mobile. Further, there is no evidence offered or much available that Israeli policy intended to destroy the Gazan polity and economy. And when Tony advises that Israel needs to remove all its settlements from the Gaza Strip, we wonder where he has been since 2005 when Israel did precisely that. So my urging of evidence-based ethical assessments seems to have fallen on deaf ears in this case.

²⁴ Cf. Carl Conetta, “Operation Enduring Freedom: Why a Higher Rate of Civilian Bombing Casualties,” Project on Defense Alternatives *Briefing Report* #13, 18 January 2002. The comparison in the title is to the 1999 Balkans campaign, Operation Allied Force (OAF) aerial bombing campaign in which approximately half the number of civilians died. The differential death toll was traced to different mission objectives (OEF aimed at removing the Taliban regime and killing or capturing as many Taliban and Al Qaeda cadre as possible whereas there was no effort to overthrow the regime in Serbia or kill civilian leaders), differences in operational and tactical features of each of the bombing campaigns so that even though more accurately targeted explosives -- smart GPS directed bombs -- were used but against far fewer fixed targets but in much less populated region, there were still more unintended civilian casualties, and the mix and technical characteristics of the weapons employed, namely a much higher proportion of naval aircraft and use of B1 and B52 bombers flying at higher altitudes for much longer sorties even though the ethical norms were probably applied more rigorously in Afghanistan compared to Kosovo. Human Rights Watch and Reuters provided similar estimates. <http://www.comw.org/pda/0201oef.html#appendix1>

²⁵ “Bibi vows to topple Hamas if elected,” *Jerusalem Post*, 3 February 2009.

Nevertheless, I intend to try again in discussing “intention” and go further and recommend practical steps, beginning by stating unequivocally that Israeli’s military goals were not to destroy the Gazan polity and economy – that is erroneous with respect to the current Israeli government policy, though clearly if the Hamas regime were replaced by a more moderate one, all Israeli leaders would have rejoiced, but that was not an articulated war aim or one indicated by the actual conduct of the war. Neither was Israel’s aim the minimal objective recommended by Tony - to take out rocket sites, something not possible to do. The goal was clearly, unequivocally and repeatedly stated: (1) to damage Hamas’ capabilities to smuggle weapons into Gaza; (2) to inhibit Hamas from launching rockets against Israel; (3) to provide a durable and sustainable situation of security for the Israeli civilian population, and (4) to avoid a two-front war by inhibiting Hezbollah from entering the war on the side of its ally, Hamas, in Gaza, a goal achieved since Hezbollah only fired two insignificant rockets over the three weeks of warfare. There were supplementary goals not relevant to the ethical issue, such as showing that Israel had learned its lessons from its poor performance in the Lebanon War²⁶ and to create a better working relationship with Egypt and the Europeans.²⁷ But there was another ethical goal that was also clear, both for political, public relations, legal and ethical purposes: to minimize civilian casualties.

Since the war was also being fought for international minds and hearts, new techniques were used, such as posting pictures of Hamas fighters on YouTube shooting from schools, hospitals and densely populated residential areas. Further, since the humanitarian and human rights NGOs have come staunchly, vocally and even abusively to the defense of Gaza and have accused Israel, often in vitriolic and questionable terminology, of human rights abuses and gross violations of human rights amounting to war crimes²⁸, it is even more critical that a cool analysis of the facts, intentions and implications of the ethical and legal dimensions of the war be analyzed. Voices which have come to Israel’s defence from supporters of Israel who would normally be identified

²⁶ As the famous historian, Michael Oren noted, the war was called Operation Cast Lead because of a Hannukah poem by Haim Nachman Bialik since the war started on 27 December 2008, the 7th day of Hannukah, and ‘cast lead’ refers to a cast lead dreidel, the spinning top children play with on Hannukah. The second verse reads: “Teacher bought a big top for me, Solid (cast) lead, the finest known. In whose honor, for whose glory? For Hanukkah alone.” And, of course, Hannukah celebrates casting off the yoke of Greek oppression in the Maccabean Wars.

http://www.neshamah.net/reb_barrys_blog_neshamah/2008/12/operation-cast.html

²⁷ In retrospect, it is unclear given the PM of Turkey’s previous statements why Israel did not also see its goal as minimizing the negative response of the new regime in Turkey. However, with respect to Europe, Israel received muted support from France, Italy the Czech Republic and others. The strongest condemnation came from Irish Foreign Minister Micheál Martin who described Israel’s airstrikes as offensive rather than defensive operations and described the Israeli ground operation as “indiscriminate attacks” although he also condemned the firing of rockets into Israeli territory. (“Minister for Foreign Affairs Condemns Israeli Air Strikes Against Gaza,” Department of Foreign Affairs, Ireland, 28 December 2008 and “Minister for Foreign Affairs Condemns Latest Atrocity in the Gaza Conflict,” Department of Foreign Affairs, Ireland, 6 January 2009.) In a more reserved tone, Swedish Foreign Minister Carl Bildt described the Israeli airstrikes as a “serious continuation of the escalation of the tension,” though he too acknowledged that Hamas refused to renew the ceasefire. (“Speech by Minister for Foreign Affairs Carl Bildt on the Situation in Gaza,” Ministry of Foreign Affairs Swedish Government Offices, 8 January 2009.)

²⁸ One estimate tracked 50 NGOs issuing 500 statements accusing Israel of “wanton killing,” “deliberately targeting civilians” and “war crimes”. NGO Monitor Report

as great defenders of human rights in the world, like Irwin Cotler and David Matas in Canada, are denounced as apologists when they object to the venom, the almost total lack of objectivity, the previous record of bias against Israel, the factual distortions, the failure of proper investigation, the lack of analysis and record of condemnation of the other side, the failure to treat any other conflict in the world with the same energy and moral outrage, etc. For here is the greatest disproportion and asymmetry. If there were not so many humanistic Jews involved in those voices, one would be tempted to suspect something else leading to such bias.

My own assessment, though this would require another paper, is that the failure of objective analysis is not motivated by anti-Semitism, except for clear partisans and some extremists, but by a universalistic humanistic outlook combined with a sense of disappointment that the state dominated by Jews and for Jews has not become a “light unto the nations” in their vision of a universalist light. I think it is true of Tony’s analysis where he expresses his belief that in the best of all possible worlds, Israel and Palestine would be a united state instead of two states with Jerusalem as an international city. The conflict is viewed through an idealistic lens and the party with the overwhelming strength on its side is found to be wanting as the identification and empathy goes out to the victims. However, there is no assessment of who is responsible for those victims in the context of the ethics and laws of war. Rather, the powerful by definition are at fault, for within the narrow context of both time and space, the powerful *ab initio* are presumed guilty rather than innocent and condemned without reference to a detailed analysis of facts and of the accepted norms to evaluate the context. It is this disproportion and distortion that this paper is mainly aimed at correcting, tinged with some cynicism of whether such detachment is possible.

To make my own biases very clear, though I began as an anti-Zionist Jewish youth, in 1967, after the 1967 war, I became an extreme dove and strong supporter of a two state solution with a divided Jerusalem and have worked since the seventies to advance that proposition as both the only realistic and ethically correct solution to the conflict. Further, as the goal has come closer as the right extremists of rejection on both sides have weakened but as the humanistic cosmopolitan rejectionists have grown stronger at the same time, I view the window of opportunity that seemed so open at the end of the Oslo process as closing and that if the opening is not widened at this time, there is a risk that it may never be and that one party, whichever is able to maintain and grow in strength, will emerge as the winner and the other survive only as losers.

The bias of many NGOs began before the war in labeling the pressure Israel put on Gaza as “illegal” and an “act of collective punishment of ordinary men, women, and children”.²⁹ Human rights agencies such as Oxfam or humanitarian agencies such as CARE attempted to prevent war by calling on all parties, both Hamas and Israel, to pull

²⁹ Open Democracy: “the blockage on Gaza in terms of loss of livelihoods, restrictions on movement...has no moral, administrative or legal force whatsoever...” <http://www.opendemocracy.net/article/email/a-crisis-of-dignity-in-gaza>

Mary Robinson: “All signs increasingly point to an Israeli assault in Gaza which contravenes international legal norms relating in particular to proportionality and collective punishment.”

back from the brink and avoid war by Hamas stopping its rocket attacks against Israel and by Israel in a call to lift the economic restrictions on Gaza. They correctly foresaw humanitarian disaster in Gaza with the consequent destruction of much of their hard work and effort and their dedication in serving and enhancing the lives of Gazans. However, did they ever self-critically analyze to what degree their involvement, sympathies and lack of objectivity (dictated in large part by their understandable empathetic identification with those in peril and likely to suffer worst) helped reinforce Hamas intransigence, allowed Gaza to use its limited resources to bring in more rockets of greater accuracy and range through tunnels, and, in reality, brought the prospect of war closer? I think the same applies to academic analysis. However much I like and indeed honor Tony as an ethicist and “*mensch*”, I think that the blinkers offered by his underlying cosmopolitanism and strong belief in the overwhelming importance of good intentions contributes to the distortions and disproportionate judgment that even make a dedicated peacenik like Shimon Peres blow his cool and become outraged at the response to Israel taking the war path in Gaza.

Basically, the function of ethical and legal judgments with respect to war is to apply the norms of *ius in bello* to the war once parties, whether Hamas or Israel, have decided to take the route of war and not the path of negotiations, Peaceniks and cosmopolitans generally believe that war and violence do not create new opportunities for peace but exacerbate conflict. Though any peacenik clearly prefers negotiations, there is a great deal of evidence on the realist side to show that sometimes war and not negotiations lead to peace. But whatever be the case, in applying *in ius bello* norms, the obligation of the evaluator is to assess the situation dispassionately and with detachment in terms of those norms and risk being branded either as indifferent to the genuine humanitarian suffering of the victims of the war with a concern with the detailed facts and precedents in understanding the norms, or terribly biased but hiding that bias under a veneer of objectivity.

IV The Larger Context of Intention

There are three levels of context – the mega political context of the Gaza War itself, the median context of the legal and ethical framework of the spirit of the times in which the evaluations are being made, and the immediate context of the war itself. On the mega context, some consider that war crimes and crimes against humanity have become so extensive in a globalized world that civilian suffering is simply viewed as the inevitable by-product, the flotsam and jetsam, of economic globalization and as part of neo-colonial “intentions”. We could ask what light the debates over “malevolent intent”, particularly in the genocide literature, throw on the issue of intent in just war theory and practice.³⁰ Others regard the shock and awe techniques used in modern warfare, as in the American-led defeat of Serbia in the Kosovo War, as creating military contexts in which there is a far greater latitude allowed for war crimes and abuse of ethical norms so that the 1200+ casualties from the Gaza War in which many if not most are considered civilians with very few deaths on the Israeli side as the self evident reality of war crimes

³⁰ Cf. Tony Barta, “With intent to deny: on colonial intentions and genocide denial,” *Journal of Genocide Research*, 10:1, March 2008, 111-119.

and crimes against humanity as a result of settler imperialism considered as inherently genocidal.³¹

There is the context of the proximate cause of the war, namely Israel's response to over 7000 rockets and mortars against Israeli civilian targets after Israel unilaterally completely withdrew from Gaza in 2005 that had the effect of weakening Fatah and bringing Hamas first to political power in Gaza and then to absolute military power when it engaged in a military coup to dislodge the Fatah from the Strip altogether, and then Israel's closure of the border crossings. It was clear, that in spite of the small number of casualties, Israel could not and would not tolerate any longer Gaza's relative impunity from military reprisals for sending rocket after rocket that partially emptied first Sderot and then threatened the larger cities of Ashdod and Beersheva as Gaza developed and imported through its tunnels more sophisticated weapons from Iran.

In the immediate context of the Gaza War itself, when the Israeli GOC Southern Command called for setting Gaza back 10 years, then how can the targeting of civilians even be in question? Except that the statement was taken out of context and referred specifically to setting Hamas back a decade in terms of "military capabilities".³² Even then, is this not Lebanon redux? In declaring war on the densely populated Gaza strip in response to large numbers of rockets – over 7,000 – in which very few Israelis were killed – 13 over the years – is this not itself self evidence of war crimes when over 1200 are killed in three weeks, most of whom are allegedly civilians with only an additional 13 Israelis, almost all military personnel, killed during the war?

As part of that context, there is also the current international threat of charges³³ being laid against Israeli soldiers (and legal advisers) who visit territories that claim universal jurisdiction over the laws of war when the Israeli government fails to try alleged "suspects". Judge Fernando Andreu of Spain launched a specific investigation into seven current or former Israeli officials over a 2002 bombing in Gaza that killed a top Hamas militant, Salah Shehadeh, and 14 others, including nine children. Just after that, but before Operation Cast Lead was launched against Gaza by the IDF, Spanish Foreign Minister Miguel Moratinos informed Foreign Minister Tzipi Livni of Spain's plans to amend legislation to prevent future war crimes investigations and trials against Israeli officials. Nevertheless, Israel expects a spate of lawsuits and war crimes charges by overseas pro-Palestinian organizations against Israelis involved in the latest Gaza

³¹ Cf. Norbert Finzsch (2008) "If It Looks Like a Duck, If It Walks Like a Duck, If It Quacks Like a Duck: Comment on 'Can There Be Genocide Without the Intent to Commit Genocide?' by Gunter Lewy." *Journal of Genocide Research*, 119-126.

³² Uri Blau, "GOC Southern Command: IDF will send Gaza back decades," *Haaretz*, 28 December, 2008. <http://www.haaretz.com/hasen/spages/1050434.html> The reference was specifically stated in terms of weapons capabilities as Major General Galant of Southern Command articulated the military goals: "to significantly damage Hamas' leadership, tactical capabilities and smuggling routes."

³³ This has not just been a future threat. A British judge issued a writ against Maj. Gen. (res.) Doron Almog over the destruction of 30 houses in Rafah as the first instance of the 1957 law that incorporated the Geneva Conventions as part of domestic law.

fighting, the killing of civilians and the destruction of property.³⁴ On the other hand, when troops fight in crowded, densely built-up areas where terrorists are embedded and where explosive devices, tunnels and booby traps are everywhere, are not civilian casualties inevitable?

There is the larger asymmetrical context in which Israelis are judged compared to Palestinians. Was any outrage or wrath heard when, after Israel's withdrawal from Gaza, thousands of rockets were reigned down on Israel? Were there any special motions in the Security Council? Rabbi Jack Moline of Agudas Achim Congregation in Alexandria, Virginia, tells the following old joke. "A group of tourists taken prisoner by a guerilla group in a distant country. The leader of the gang tells them they will be executed one by one, but they will each be granted a last request. An Israeli member of the group volunteers to go first, and as his last request asks to be kicked in the rear end. The kidnappers are mystified, but after a little back and forth they agree to the request and one of them plants a swift boot on the Israeli's backside. At that point, the Israeli spins around and, with a combination of fists and guns, disables all the guerillas. Stunned, the survivors turn to him and one of them asks, 'Why did you ask for a kick in the rear before you did that?' The Israeli answered, 'Because otherwise the headlines would read 'Tourists Rescued After Unprovoked Israeli Attack.'"³⁵

But which ethical issues shall we consider – the methods used in the conduct of the war such as the use of everything from mortars to phosphorous.³⁶ I will consider

³⁴ Barak David, "Spanish FM: "We'll act to prevent war crimes probes against Israel" *Haaretz*, 01.01.2009; Ze'ev Segal, "Analysis: Spain war crimes probe should not surprise Israel," *Haaretz*, 01.01.2009.

³⁵ Rabbi Jack Moline, "Is Gaza a Just War?" *Religion & Ethics*, 8 January 2009.

³⁶ There were widespread accusations that Israel exploded phosphorous shells in densely crowded areas of Gaza. According to the IDF, 200 phosphorus shells were fired from mortars, 180 targeting orchards where gunmen had hidden after launching rockets. Evidently a reserve paratroop unit did explode about 20 shells in a built-up area of northern Gaza and that is the case under investigation. Col. Shai Alkalai is investigating the matter for the IDF. (Peter Beaumont, "Israel admits its troops may have used phosphorus shells in Gaza," *The Guardian*, 21 January 2009. In the meanwhile, Peter Herby, head of the International Committee of the Red Cross (ICRC) Arms Unit, stated, "The use of weapons containing white phosphorous is, like the use of any other weapon, regulated by the basic rules of international humanitarian law. These require parties to a conflict to discriminate between military objectives on the one hand and civilians and civilian objects on the other. The law also requires that they take all feasible precautions to prevent harm to civilians and civilian objects that can result from military operations. Attacks which cause "disproportionate" damage to civilians and to civilian objects are prohibited. Using white phosphorous as an incendiary weapon, i.e. to set fire to military targets, is subject to further restrictions. The use of such white phosphorous weapons against any military objective within concentrations of civilians is prohibited unless the military objective is clearly separated from the civilians. The use of air-dropped incendiary weapons against military objectives within a concentration of civilians is simply prohibited. These prohibitions are contained in *Protocol III of the Convention on Certain Conventional Weapons*. Gerald Steinberg claimed in a column ("Human Rights Watch: White (Phosphorous) Lies," *The Jerusalem Post*, 17 January 2009: <http://www.spme.net/cgi-bin/articles.cgi?ID=4957>) that ICRC issued a statement that there was no evidence that Israel used "phosphorus in a questionable way, such as burning down buildings or consciously putting civilians at risk.," even though ICRC rarely issues such statements but discusses alleged breaches of war crimes with the combatant nation. In fact, ICRC not only said that the use of phosphorous was not illegal, but also did, say – unusual for ICRC – that, "We have no evidence to suggest

instruments of war under this ethical analysis only in relationship to civilian casualties. In the military means utilized, was appropriate discrimination employed by the military as part of its goal of restricting targets to military objectives and minimizing collateral damage especially to civilians and noncombatants. Were the military doing enough to protect neutrals, warn civilians and target with precision?

V Intention Re Civilian Casualties

But which civilian casualties? Extremists may argue that it is a distinction without a difference. For example, in response to the rain of rockets from Gaza on Sderot, the retired 80-year old Sephardic Chief Rabbi of Israel, Morechai Eliyahu, held the whole population of Gaza responsible and declared there was “absolutely no moral prohibition against the indiscriminate killing of civilians during a potential massive military offensive in Gaza.”³⁷ Would that justify the failure to allow the evacuation of wounded civilians part of the problem of intent? Then even the unacceptable use of phosphorus in areas populated by civilians and attacks on hospitals and mosques would be considered legitimate as long as the intent was not to kill civilians. However, even then, is targeting a civilian who heads a terrorist organization a legitimate target?³⁸ Most important, since few moral or legal scholars of just war would accept the indiscriminate killing of civilians even if the killing of civilians were not part of the intent, how many civilian casualties are considered tolerable collateral damage. Do the numbers tolerated change if the terrorist leader is deemed a legitimate assassination target and if civilians on your own side are in immanent danger? Do the numbers change if 1200 deaths do not succeed in getting the Palestinians in Gaza to stop showering the towns in Israel with rockets? According to Rabbi Eliyahu, the numbers tolerated increase. “If they don't stop after we kill 100, then we must kill 1,000,..if they do not stop after 1,000 then we must kill 10,000. If they still don't stop we must kill 100,000, even 1 million. Whatever it takes to make them stop.” For according to Psalms, “I will pursue my enemies and apprehend them and I will not desist until I have eradicated them.” “I will pursue my enemies and apprehend them and I will not desist until I have eradicated them.”

In 2002, a team that included commander of the International Law Division (ILD) of the Israeli Defence forces (IDF) at the time, Daniel Reisner³⁹, Asa Kasher, the Tel Aviv University philosopher and winner of the 2000 Israeli Prize who edits the highly respected philosophy and linguistics journal, *Philosophia* and who authored the IDF *Code of Conduct*“, and headed by Aluf (Major General) Amos Yadlin head of Aman, the Israeli Military Intelligence Directorate, considered the laws of war as they apply to

it's being used in any other way,” than to light the battle field.

<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/weapons-interview-170109>

³⁷ *Jerusalem Post*, 30 May 2007. According to some Muslim clerics the indiscriminate killing of civilians from either side would not be a sin as long as the intention was not to kill civilians. Cf. Sheikh Hamed al-Ali, April 2002. See his “Covenant of the Supreme Council of Jihad Groups, 14 January 2007.

³⁸ For example, the IAF killed Hamas Interior Minister Said Syyam in the Gaza house where he was hiding during the Gaza War.

³⁹ Reisner, who joined the ILD in 1985, headed the unit for 10 years and since retiring from the army has been a partner and headed the Public International law and Human Security Division in the law firm of Herzog, Fox & Neeman.

targeted assassinations.⁴⁰ Given that a Palestinian male bachelor between 18 and 45 years of age was known to be planning to kill an Israeli male of the same age the next day, given the only opportunity to kill him in advance was to use a missile that would result in civilian collateral damage, how many civilian deaths were tolerable in order to take out the Palestinian assassin?

In the last 15-20 years, the ILD been extensively involved, not only in very general issue of guidance for the IDF, but in specific issues of targets as well. A concern has grown that this growing reliance on legal advice in the course of a military operation since the Winograd Report was published on the management of the Second Lebanon War, shifts individual responsibility from officers to advisers to the detrimental effect on both decision-making and effective operations. In the Gaza Operation, ILD personnel provided extensive input to the General Staff, not only in the planning stages of Operation Cast Lead, but in the whole course of battle. ILD officers are embedded with the troops and attend operational meetings. After first receiving notification of targets as well as intelligence material. ILD officers have been involved in authorizing 'chance' targets such as against squads about to fire Qassam rockets.

However, is the ILD involvement itself a fraud? Orna Ben-Naftali, Dean of the Faculty of Law in the College of Management at Tel Aviv University, certainly thinks so and further, that the whole field of international law is a fraud and bankrupt and is used only to justify force in situations where distinctions between civilians and combatants are impossible and lay the groundwork for subsequent war crime trials where the ILD officers are implicated for ignoring context and for providing a rationale for war crimes. In contrast, Gabriella Blum currently teaching at the Harvard Law School and a former ILD officer, insists that, the division between combatants and civilian targets need to be made however difficult that is.⁴¹ In a much more spirited defence of the IDF respect for international law, Avichai Margolit, the Israeli Military Advocate General, insisted that the IDF's was committed to international law as part of Israel's national and moral identity; that is also the way we acted during the fighting in the Gaza Strip. "A military jurist, like any legal adviser, is obliged to give the body he is advising the whole gamut of legal tools to achieve its goals while strictly adhering to the law. Like any other military man, he is obliged to carry out this task to the best of his professional ability, out of a deep loyalty to the values of 'the spirit of the Israel Defense Forces,' such as credibility, respect for human beings and the use of arms for legitimate purposes only... It reflects our professional understanding that the commanders need legal advisers who are accessible and trained, who will point out what is forbidden and permitted. Legal advice with regard to operative decisions is not theoretical or academic. It is expressed in the commanders' far-reaching decisions. There is no place in this kind of advice for the vague and nonbinding style that sometimes typifies academic thinking and writing. Like the

⁴⁰ Although targeted assassinations of civilians has been an integral part of Israeli military operations that began even before the state was formed – Shamir's "boys" assassinated Count Folke Bernadotte the UN Mediator, in 1947 – but the assassination of Thabet Thabet, the Fatah Secretary General of Fatah in Tul Karem area in December 2000 was the incident which raised the legal issue in a large way in military circles in Israel. In the Gaza War, both dr. Nizan Rayan and Sa'id Siam, both senior Hamas officials, were "extra-judicially executed".

⁴¹ Feldman and Blau

commanders, the military legal advisers are required to formulate clear positions and opinions in real time, amid the fog of battle, in circumstances that heighten the legal dilemmas that characterize modern warfare.”⁴²

This paper will leave aside the consideration of larger contexts on the mega, median and immediate scale to others and instead consider specific incidents in which civilians were killed in the Gaza War.

On the first day of Operation Cast Lead, the air force bombed the graduation ceremony of a police course, killing dozens of policemen. Months earlier, an operational and legal controversy was already swirling around the planned attack. According to a military source who was involved in the planning, bombing the site of the ceremony was authorized with no difficulty, but questions were raised about the intent to strike at the graduates of the course. Military Intelligence, convinced the attack was justified, pressed for its implementation. Representatives of the international law division (ILD) in the Military Advocate General's Office at first objected, fearing a possible violation of international law.⁴³

This report indicates that the IDF was clearly aware of the issue of intent both as an ethical and a legal issue in assessing actions in the conduct of war. Secondly, at least initially, there was a difference of opinion between the military strategists and the representatives of the IDF international law division (ILD)⁴⁴. Third, the strike only went ahead when the ILD authorized it. On the substantive level, one issue of debate was how come on one day, people who are civilians, on the next day are considered military simply by participating in a graduation ceremony to convert them from being civilians.

⁴² Avichai Mendelbilt, “Advice under fire,” *Haaretz* 29 January 2009.

⁴³ Yotam Feldman and Uri Blau, *Haaretz*, 31 January 2009.

<http://www.haaretz.com/hasen/spages/1059925.html> The evidence for the police being involved with the security forces fall into two categories:

- a) Pre-vetting: to prevent terrorists from being recruited into the police force, the Palestinian police, in accordance with the Oslo Accords and the Palestinian Police Act, were to be selected in cooperation with Israeli security forces (Annex I, Article II, Oslo Accords, but Hamas (following in the footsteps of the PA) did not submit a list of all potential police recruits to Israel for approval (Annex I, Article IV (4)) Not only has Israel been denied pre-vetting rights, but known terrorists were recruited into the police force;
- b) Instead of 9,000 police permitted under the Gaza-Jericho accord of May 1994 (Annex I, Article III (3)), first 20,00 and then 24,000 (Oslo II, Annex I, Article IV (3)) were deployed; that figure has been exceeded by at least 10,000 and perhaps 26,000. Reports suggest that the Palestinian security forces may exceed 50,000 men.

⁴⁴ There is no connection between the ILD sanctioning an action and such an action being both legal and ethical. Further, it certainly does not mean that the ILD was “objective”; the ILD may be more militant and pro-IDF than comparable civilian bodies, either because of internal pressures or simply the cultural atmosphere and the imperatives of war to provide the tools to allow the army to operate legally as a restraint without impeding its effectiveness. Finally, the ILD operates within a human personal context with a different role when the head of the ILD is the more reticent Colonel Pnina Sharvit-Baruch (in contrast to his predecessor, the renowned and widely respected Daniel Reisner) and the head of Southern Command in charge of Operation Cast Lead is General Yoav Gallant with a reputation as a cowboy indifferent to legal niceties..

Secondly, the conversion was not to military but to the police and Hegel defined police as part of civil society because their mandate was “to serve and protect” civilians not to attack enemy soldiers. On the other hand, ILD evidently determined that police were part of Hamas’ security forces and, therefore, part of the armed forces. According to the news report, the ILD spokesperson said that the ILD concluded that these police graduates were not perceived as police “but the equivalent of the army, just as in the face of the enemy’s army every soldier is a legitimate target.” Prof. Yuval Shany, a professor of public international law at the Hebrew University of Jerusalem, claimed that although in international law attacking police is prohibited by international law, Hamas uses police in combat roles and therefore the distinction becomes moot.⁴⁵

Though Palestinian and pro-Palestinian human rights and humanitarian organizations denounced the action as a war crime based on indications of “a malicious intent to inflict as many casualties as possible, with many of the police stations located in civilian population centers,”⁴⁶ there was no parallel outcry when a suicide bomber in a police uniform detonated his explosives inside a police training centre in southern Afghanistan on Monday, 3 February 2009 killing 21 officers and wounding at least 20, an action for which the Taliban claimed responsibility. I could find no effort to try or indict the Taliban for war crimes.⁴⁷ My conclusion has been that, in comparison to any other violent conflict in recent years, the disproportionate outcry and accusations of war crimes against Israel have been far more asymmetrical than the lopsided death toll, as if an effort were being made to balance the distorted ratio of casualties with soft power and the use of ‘rights’ rhetoric.

The use or misuse of particular weapons such as flechettes⁴⁸, cluster bombs, ammunition with depleted uranium⁴⁹, ‘incendiary’ munitions with phosphorus, or the use of antipersonnel mines and booby traps is not the subject of this analysis except insofar as

⁴⁵ Yuval Shany has a record of being strict in the interpretation of international law in the conduct of war since, in the same interview, he claimed that IDF targeting of Hamas ministry buildings unrelated to the military “that do not serve a military purpose is a violation of the rules of war. The buildings are civilian sites and must not be attacked” but the ILD countered that since Hamas is categorized as a terrorist organization, the entire governmental infrastructure serves terrorist principles and is not immune from being targeted presumably on the basis of the logic that any form of governance under the control of terrorists is a legitimate target not because it serves terrorist purposes, but because they contribute to the support of the terrorist organization.

⁴⁶ The Electronic Intifadah, <http://electronicintifada.net/bytopic/687.shtml>

⁴⁷ Cf. Noor Khan, “Suicide bomber kills 21 Afghan police officers,” Associate Press, 2 February 2009.

⁴⁸ Amnesty International (AI) claimed that they had “found more hard evident of the use of flechettes,” (four centimeter long metal anti-personnel weapons designed to penetrate dense vegetation) by the IDF resulting in civilians being killed or injured in Gaza. AI, “Israeli army used flechettes against Gaza civilians,” 27 January 2009. <http://www.amnesty.org/en/news-and-updates/news/israeli-army-used-flechettes-against-gaza-civilians-20090127>. In fact, the use of fkechettes was first reported by B’tselem, and Israeli human rights group on 17 January following the death of a Palestinian camera man by a flechette. Cf. *Haaretz* “Rights group: IDF must ban shell that killed cameraman in Gaza”. <http://www.haaretz.com/hasen/pages/976084.html>

⁴⁹ Under investigation by the International Atomic Energy Commission – IAEA. The firing of phosphorus shells by Gaza militants on 14 January 2009 is not under investigation. Cf. Yanir Yagna, “for the first time Gaza militants fired phos phorus shell at Israel.

they result in collateral damage as may be the case in the use of mortars considered as “statistical” weapons because of their inaccuracy⁵⁰ or artillery because of their inapplicability in areas of civilian concentration. And even though one might commend Israel for alerting residents of Gaza when it targeted buildings suspected of housing weapons caches, this could be interpreted cynically as just a way to minimize civilian casualties in order not to rouse the ire of the world too much. In any case, there are still explanations required to account for the civilian buildings hit and the number of civilian casualties even if those numbers do not appear out of line in comparison to other urban war situations.

On Monday 5 January 2009, right after Israel launched its ground operation into Gaza, a United Nations Report, partially drafted by Allegra Pacheco, a senior UN official in Jerusalem, claimed that 30 people died in the shelling of a large, unfinished warehouse-like building⁵¹ owned by the Samouni clan in the Zeitoun neighbourhood of Gaza.⁵² Further, the Report claimed that the Israeli Defence Forces had herded the people into the warehouse the day before after initially moving the civilians from house to house. The UN Office for the Coordination of Humanitarian Affairs (OCHA) offered no evidence that the attack was deliberate and Allegra Pacheco insisted that, “We are not making an accusation of deliberate action” by the Israelis. Navi Pillay, UN High Commissioner for Human Rights, insisted that the UN report should be the basis for an investigation of “war crimes elements” *not* based on intent to deliberately harm civilians, but in reference to allegations that Israel impeded medical teams trying to care for wounded civilians,⁵³ failed to care for those injured in the attack and that, in this respect, according to Pillay, the incident “appears to have all the elements of war crimes and it was unclear whether the allegation of impeding humanitarian efforts to care for civilian wounded was an entry point for an investigation into whether Israel intentionally attacked a building it knew was filled with civilians, that also could constitute a war crime.”⁵⁴

Aside from discriminating between the issue of a war crime because of failure to allow humanitarian relief (a failure in indirect intent because the criterion of making

⁵⁰ A United Nations Relief and Works Agency (UNRWA) school in which Palestinians were sheltering was hit by a mortar shell 30 meters wide of its target and killed an estimated 40 civilians. In another incident, two brothers were killed and 14 wounded, including the boys' mother, when Israeli tank fire hit a UN-run school in the northern Gaza town of Beit Lahiya and an UNRWA official, Adnan Abu Hasna called for an investigation of possible war crimes.

⁵¹ The IDF engages in *hisuf*, in Hebrew, 'expose' to refer to demolitions or flattening for various reasons such as flushing out people.

⁵² For an account of this incident, cf. *Haaretz* 10.01.09, “UN calls for war crimes probe into IDF shelling of civilian-occupied building in Gaza,” 10.01.09. <http://www.haaretz.com/hasen/spages/1054217.html>

⁵³ The Red Cross did not reach the site until 7 January 2009 and found 4 emaciated children beside their dead mothers. On 12 January, the United Nations Human Rights Council voted 33 to 1 (Canada0 with 13 abstentions to strongly condemn Israel for the military operation in Gaza that “resulted in massive violations of human rights of the Palestinian people” and then decided to send a fact finding mission. The UNHRC never once condemned the Hamas government for its rockets launched against Israel.

⁵⁴ The vocal accusations by the Red Cross are particularly telling since the Red Cross is normally reticent to air its accusations in public though it has quietly agreed that Hamas had in the past used Red Crescent and UN insignia on vehicles transporting military personnel and equipment. Further, subsequent to this incident and the outcry, the Red Cross praised the efforts of Israel to the European diplomatic community to avoid civilian casualties.

reasonable efforts to minimize civilian casualties was not met) and deliberate intent, there were six factual issues in determining intent. First, did the IDF deliberately instruct, induce or coerce the civilians to move into the warehouse, a claim which IDF spokeswoman, Maj. Avital Leibovich, says specifically did not happen and, in general, could not happen since the IDF does not “warn people to go into other buildings.” Secondly, did Israeli shells land on the warehouse, a fact that does not seem to be in contention? Third, how many died and were they civilians, a task difficult to precisely determine since the casualties were sent to at least two hospitals, and surviving relatives were scattered through Gaza City and could not account for one another. However, there seems to be agreement that there were a number of civilian casualties. Fourth, was the warehouse deliberately targeted since IDF spokesman, Maj. Jacob Dallal, noted that even the UN allegations showed the building was not deliberately targeted and that the IDF claims that, “there was no pinpoint attack on that building in question,” though the UN only claimed that it was not alleging deliberate intention but did not absolve the IDF of deliberate intent. Fifth, if the warehouse was deliberately attacked, did the IDF do so knowing civilians were in occupation and, if so, were those civilians warned?⁵⁵ Sixth, even if civilians were there and known to be there and warned, can the attack be justified because civilians in a targeted structure who remain after being warned can be considered combatants, although Colonel (res.) Daniel Reisner, who once headed the ILD, claimed that civilians remain civilians and cannot be considered targets though they can be considered legitimate -collateral damage. In the case of people who return to their home in order to protect it, they are taking part in the fighting.”⁵⁶

A more serious alleged incident, perhaps the most serious of the war, took place the next day (6 January 2009) when three mortars from the IDF allegedly killed 43 civilians in the Jabalya refugee camp in Gaza after they had taken refuge inside UNRWA’s Ibn Rushd Preparatory School for Boys.

“Hundreds of Palestinians had fled their homes for the refuge of the al-Fakhoura school, hoping the blue and white flag of the UN flying over the impromptu shelter would protect them from the Israeli onslaught. The UN had even given the Israeli army the co-ordinates for the building to spare it from the shells and air strikes raining down on the Gaza strip. But yesterday afternoon tank shells exploded outside the school, sending shrapnel into the crowds, killing at least 40 and wounding another 55. It was the worst confirmed bloodshed of Israel's attack on Gaza and sparked outrage and condemnation around the globe, with the US President-elect Barack Obama breaking his 11-day silence, the UN Secretary Ban Ki-moon calling the incident “totally unacceptable” and Gordon Brown describing the conflict as “the darkest moment yet for the Middle East”. Donald Macintyre and Kim Sengupta, “Massacre of innocents as UN school is shelled,” *The Independent* (UK), 7 January 2009. <http://www.independent.co.uk/news/world/middle-east/massacre-of-innocents-as-un-school-is-shelled-1230045.html>. See also **James Hider and Joanna Sugden**, “**Barack Obama breaks silence after Gaza UN school strike**,” *The Australian*, 7

⁵⁵ Chapter 14 of the Winograd Report on the management of the Second Lebanon War in its legal annex to the operational order states that, “as far as possible in the circumstances, the civilian population in the area of a legitimate target is to be warned” unless the action or the soldiers of the IDF force is endangered.

⁵⁶ According to a senior ILD officer, “The people who go into a house despite a warning do not have to be taken into account in terms of injury to civilians, because they are voluntary human shields. From the legal point of view, I do not have to show consideration for them.” Feldman and Boden 2009.

January 2009. <http://www.theaustralian.news.com.au/story/0,25197,24882896-2703,00.html>

UN Secretary-General Ban Ki-moon in a “harsh and grim” report to the Security Council demanded a thorough investigation by Israel of “several incidents of outrageous attacks against UN facilities.”⁵⁷

Subsequent investigations established the following:

- UNRWA provided the IDP map coordinates of all its schools, and buildings
- The IDF initially claimed that they were simply returning fire that had been coming from the compound, thereby implicitly accepting the claim that they had hit the compound
- The IDF subsequently withdrew both the claim that they had responded to fire from the compound by claiming that the militants had launched two missiles from a yard adjacent to the building, and their acceptance of the fact that their shells had hit the school that fell within the 30 yard error range of the mortars, then once again reversed positions and reinstated its original claim, ignoring Hanan Abu Khajib’s testimony “that Hamas fired just outside the school compound, probably from the secluded courtyard of a house across the street, 25 yards from the school”⁵⁸
- No one was killed inside the school or even within the compound grounds, though 12 were injured from flying shrapnel.
- On 2 February 2009, UNRWA corrected the record and issued a statement that the UN “would like to clarify that the shelling and all of the fatalities took place outside and not inside the school.”⁵⁹
- UN-OCHA did not correct its claim that the people were killed *inside* the school long after this claim had been disproven.⁶⁰
- 41 were killed on the street outside, including 3 school children then out on the street, though the IDF still disputes that figure as too high; however, very few reports noted that two Hamas militants were included in the dead.

However, a large number of civilians were hit, and the question remains whether that collateral damage was too great just to kill the two men firing the missiles. On the

⁵⁷ Security Council Report, 21.01.09. Palestinian representative Riyad Mansour, said he was satisfied with Ban’s comments because in his view “determining the next step...includes many things, including legal proceedings in (the) international legal system.” Cf. Shlomo Shamir, “Un official: Israel should probe shelling which damaged UN buildings in Gaza,” *Haaretz*, 22 January 2009.

⁵⁸ Erlanger, *ibid.* Note that Hamas even sheltering beside a school to fire a rocket and thereby risk the lives of civilians could potentially be a war crime.

⁵⁹ Amos Harel, “UN backtracks on claim that deadly IDF strike hit Gaza school,” *Haaretz* 3 February 2009.

⁶⁰ The UN’s Office for the Co-ordination of Humanitarian Affairs in “its more comprehensive weekly report, published three days later, stated that “Israeli shelling directly hit two UNRWA schools ...”, Patrick Martin, “Account of Israeli attack doesn’t hold up to scrutiny,” *Globe and Mail*, 29 January 2009. Cf. Un OCHA, “Situation **report** on the humanitarian situation in the Gaza Strip No.18 ... 27-28 January 2009. The document contains no correction of its earlier claims.

<http://www.reliefweb.int/rw/rwb.nsf/db900SID/MYAI-7NR5GD?OpenDocument>

other hand, why did the reports not condemn Hamas for using innocent civilians as shields when firing missiles from locations crowded with civilians?

What about the UNRWA vocational training centre and headquarters in Gaza City struck about a half-dozen times where hundreds of Gazans had sought shelter, wounding three people. Even U.S. Secretary of State Condoleezza Rice issued a warning to Defense Minister Ehud Barak and Foreign Ministers Tzipi Livni in the aftermath of this incident. Further, some incidents in which the IDF was accused of killing civilians, as when Matthew Fisher reported in *The National Post* (10 January 2009) that two UN truck drivers were killed by what UN officials claimed was an Israeli tank attack, was later corrected when first it was established that only one driver was killed and then afterwards UN officials admitted they could not be sure of the origin of the firing. The IDF all along denied responsibility and an IDF medic demonstrated that the driver had been killed by gunshot wounds, not shrapnel. So the first casualty of the fog of war is often the facts. But the critical issue of intention *in ius bellow* is to determine whether the party that killed civilians or risked the lives of civilians in a retaliatory attack properly weighed the military benefits against the potential of civilian harm (proportionality) and took the necessary steps to avoid collateral damage (intent).

VI Discriminating Between Combatants and Non-Combatants in the New Wars

The following are suggested as general guidelines for independent evaluators in analyzing intent and the required discrimination between combatants and non-combatants:

1. Given the record of existing human rights organizations, including Amnesty International, Human Rights Watch, let alone the rights organizations located and run by partisan groups, and given a record of enormous disproportion between the attention paid to one combatant that professes to follow the ethical and legal norms versus the combatant who explicitly rejects the applicability of such norms, and given the media pressures and the understandable propensity to identify with victims, they have not demonstrated an ability to provide independent evaluations in such situations and have become part of the problem rather than the solution, primarily because they have adopted as their proper role shaming and condemnation – a role that is important in itself – but not a role of judicious and prudent judgment.
2. The military objectives of *all* combatants should be clearly stated and verified and assessed independently according to *ad bellum* norms;
3. The processes of each combatant to guide, monitor and subsequently evaluate breaches in the norm of intent should be examined and evaluated;
4. Independent prudent evaluators should *not* jump to conclusions about individual incidents and should certainly not come to conclusions about illegal activity or unethical activity without an independent investigation unless the party itself owns up to the action and its responsibility for that action, and, hopefully, developing such a record will lead to developing guidelines that can be embedded in training to help ensure that when opportunistic targets emerge, military

- personnel can appropriately weigh civilian costs against short term military successes even in time sensitive situations;
5. Evaluators should not only be independent but should demonstrate their independence with a record of prudence and judiciousness in evaluation of particular incidents and specific violent conflicts;
 6. Though body or forcefully displaced counts in themselves provide no answers without taking into account context, military objectives and strategies, an independent auditor of deaths, casualties and forcefully displaced should be established to avoid the inevitable result of truth becoming the first casualty of war, for without the truth there can be no judgements of illegal or unethical behaviour;
 7. As much as it may appear to be superficially repulsive and risk giving permission to allow non-combatants to die in military exercises, a comparative data base should be developed that establishes second order norms for different contexts to provide guidelines for how many non-combatants deaths can be tolerated in, for example, responding to direct attacks launched from the midst of civilians;
 8. An organization made up of ethicists and international legal experts should take ownership of the problem of establishing an institutionalized mechanism for independent evaluation otherwise ethicists and international lawyers are failing in their responsibility to uphold ethical war standards;
 9. The organization should establish mechanisms for evaluation in the context of the difficulty of obtaining information during violent conflict in real time that is reliable while taking into account that certain measures to avoid civilian deaths in the short term may possibly contribute to producing more civilian deaths in the long term;
 10. The organization should establish norms for evaluating the reliability of information.

None of this will help solve the problem of determining whether 4 or 40 civilian casualties would have been acceptable in taking out the two militants shooting mortars from amongst civilians, and although one suspects that the delineation of guidelines might always fail in responding to variations in situations, without establishing a series of case studies, we are unlikely to come close to establishing such norms and will have to surrender real responsibility to each of the armed forces involved for establishing such standards instead of creating institutionalized independent evaluators.

Further, it needs to be noted that one difference between the legal and the ethical approach, though there is no reason for such a difference, is that international law demands an investigation to establish whether there was any intent to commit war crimes. Ethical investigations however are easier since they do not require the elaborate paraphernalia of the state and offer a wider scope for analysis. An ethical investigation could clarify both the meaning of “excessive” or “disproportionate” force as well as of “indiscriminate” use of force, whether alternative military options were weighed, and what actions were taken to protect the civilian population. Such an investigation would require a clarification of the facts, and draw conclusions from those facts by a body of independent investigators as soon after the alleged events as possible and in as

transparent a manner as possible.⁶¹ In the process, second order rules could be developed on processes and guidance rules developed for different types of contexts to assist actors in making ethical and legal determinants when they are involved in violent conflict. It is important that we begin to move from discussions about the abstract conceptions and rules of just war theory to zero in on differences on norms for determining acceptable and unacceptable conduct, in particular, how to adjudicate between giving priority to military objectives versus ethical norms determined to reduce civilian collateral damage towards zero so that these can be debated and translated into ethical practices.

Though nothing can be done to bring back to life Bisan, Mayer, Ayan and Nour Abu al-Aish, the case might be a good place to begin establishing a just war ethical investigative regime that will have as one of its main tasks determining when and how a military action can be deemed to be a product of negligence, and, therefore, a breach of the “intention” norm, rather than a “reasonable” mistake however distasteful the latter conclusion may be to the humanitarian and human rights communities. To quote Tony Lang, “Every war in history, regardless of the justice or prudence of such wars, has resulted in civilian casualties, which rightly invites scrutiny as to the proper conduct of the use of force.”⁶² Unless such norms are properly articulated in detail backed by appropriate case studies, the less likely we are to develop proper investigative techniques and detailed norms and practices for minimizing collateral damage.

⁶¹ Eyal Benvenisti on 28 January 2009 called for such an investigation. Cf. “An obligation to investigate,” *Haaretz*. <http://www.haaretz.com/hasen/spages/1059435.html>

⁶² Anthony F. Lang and Mary-Lea Cox (2002) “Justice after War,” Carnegie Council, November/December <http://www.cceia.org/resources/publications/inprint/773.html>